

Message Text

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USMTN

PASS STR (STARKEY) AND USDA (HATHAWAY)
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E.O. 11652: N/A
TAGS: MTN, ETRD
SUBJECT: SUBGROUP DAIRY MEETING, MAY 30-JUNE 1, 1978

REF: STATE 135550

1. SUMMARY. THE SUBGROUP DAIRY MET MAY 30 - JUNE 1 AND EXAMINED IN DEPTH VARIOUS LEGAL PROBLEMS OF THE DRAFT PROPOSAL. THE CHAIR STATED THAT THE TEXT OF THE AGREEMENT SHOULD BE READY BY THE END OF JUNE, EXCEPT FOR THE ACTUAL LEVEL OF THE MINIMUM PRICES WHICH IS TO BE DECIDED IN THE FIRST DAYS OF JULY. END SUMMARY.

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2. CHAIRMAN LUCQ OPENED MEETING MORNING OF MAY 30 WITH STATEMENT THAT WE MUST HAVE TEXT READY IN 45 DAYS. BY FIRST WEEK OF JULY, HE SAID, WE MUST HAVE TEXT COMPLETE AND DECIDE ON PRICE LEVELS. THE FOLLOWING MATTERS MUST BE SETTLED AS QUICKLY AS POSSIBLE.

(A) LEGAL QUESTIONS INVOLVING THE RELATIONSHIP OF THIS

DAIRY ARRANGEMENT (IDA) TO THE GATT. THE SECRETARIAT, IN ITS LEGAL NOTE (MTN/DP/W/35) HAS IDENTIFIED FIVE SUCH ISSUES: THE VALUE OF CONCESSIONS, DISPUTE SETTLEMENT, VARIABLE PARTICIPATION IN VARIOUS INSTRUMENTS, DURATION OF THE AGREEMENT, AND DECISION-MAKING PROCEDURES;

(B) THE PROTOCOL ON CHEESES, AND

(C) HOW THE IDA WILL RELATE TO AGREEMENTS BEING
- NEGOTIATED ON STANDARDS, SUBSIDIES AND SAFEGUARDS.

LUCQ ADDED THAT GROUP SHOULD HOLD ANOTHER PLENARY BY JUNE 21 AND IN MEANTIME BILATERAL DISCUSSIONS SHOULD CONTINUE APACE. DELEGATIONS GENERALLY APPROVED THIS WORK PROGRAM.

3. VALUE OF CONCESSIONS: US DEL (KOENIG) STATED THAT TIME IS SHORT AND THAT IN ORDER TO KEEP TO SCHEDULE WE MUST GET RID OF EXTRANEIOUS ISSUES SUCH AS STANDARDS AND SAFEGUARDS. HE ASKED THAT WE AGREE NOW THAT ALL CONCESSIONS BE RECORDED IN GATT SCHEDULES AND INCLUDED IN IDA ANNEXES FOR INFORMATION PURPOSES ONLY. THIS LAUNCHED EXTENDED DISCUSSION OF LEGAL ISSUE OF VALUE OF CONCESSIONS. SEVERAL DELEGATIONS INCLUDING AUSTRALIA (FOGARTY), CANADA (GIFFORD), NEW ZEALAND (FARNON) AGREED WITH U.S. PROPOSAL. EC (JACQUOT) EMPHASIZED THAT IT LIMITED OFFICIAL USE

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WANTED "CONCESSIONS" UNDER GENERAL PROVISIONS OF ARRANGEMENT AND MINIMUM PRICE PROTOCOLS (E.G., AGREEMENT TO RESPECT MINIMUM PRICES) TO HAVE SAME LEGAL STATUS AS MARKET-ACCESS CONCESSIONS RECORDED IN GATT SCHEDULES. EVENTUALLY DISTINCTION EMERGED BETWEEN "OBLIGATIONS" UNDER AGREEMENT AND "CONCESSIONS" TO BE RECORDED IN SCHEDULES. LATTER, ALL AGREED, WOULD BE SUBJECT TO ARTICLES II (RECORDING), AND XXVIII (MODIFICATION OR WITHDRAWAL) OF GENERAL AGREEMENT. FORMER COULD NOT BE SUBJECT TO ARTICLES II, XIX AND XXVIII, BECAUSE (A) THESE OBLIGATIONS ARE SPECIFIED ONLY IN IDA, WHILE GENERAL AGREEMENT GIVES RULES GOVERNING CONCESSIONS, AND (B) THESE OBLIGATIONS WILL EVOLVE (E.G. MINIMUM PRICES PRESUMABLY WILL CHANGE) WHILE CONCESSIONS ARE FIXED. SEVERAL DELEGATIONS (INCLUDING CANADA, AUSTRALIA AND NEW ZEALAND) FELT THAT ARTICLE XXIII MIGHT POSSIBLY PROVIDE SUITABLE PROTECTION FOR THESE OBLIGATIONS. ALL AGREED THAT THE OBLIGATIONS CONTRIBUTE, ALONG WITH CONCESSIONS, TO THE BALANCE OF ADVANTAGES.

4. AUSTRALIA NOTED DOCTRINE OF "REASONABLE EXPECTATIONS" IN REGARD TO ARTICLE XXIII: SIGNATORIES HAVE "REASONABLE

EXPECTATIONS" AS TO CERTAIN BENEFITS THEY WILL RECEIVE FROM OBSERVANCE OF OBLIGATIONS BY OTHERS. IF A PARTY FAILS TO OBSERVE THESE OBLIGATIONS, OTHER PARTIES MIGHT PURSUE THE ISSUE UNDER ARTICLE XXIII CLAIMING NON-FULFILLMENT OF THESE REASONABLE EXPECTATIONS OF BENEFITS. 5. CANADA NOTED THAT ONE QUESTION INVOLVED HERE IS THAT OF WHETHER AGREEMENT IS SELF-BALANCED (THEY REFERRED TO PARA 10(I) OF THE SECRETARIAT'S LEGAL NOTE. IT COULD NOT BE SELF-BALANCED IN CANADA'S AND EC'S VIEW. US DEL ASKED WHETHER DAIRY CONCESSIONS WOULD BE GIVEN ON MFN BASIS. SECRETARIAT'S LEGAL EXPERT (VAN THUINEN) REPLIED THAT THEY WOULD HAVE TO BE. ARGENTINA (RAIMONDI) SAID THEY "COULD NOT ACCEPT THAT REPLY" BECAUSE FOR MANY IT WOULD LEAVE LITTLE INCENTIVE TO JOIN. CHAIRMAN LIMITED OFFICIAL USE

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POINTED OUT THAT ARTICLE IX OF DRAFT IDA PROVIDES THAT NOTHING IN ARRANGEMENT SHALL AFFECT PARTICIPANTS' GATT RIGHTS AND OBLIGATIONS AND NOTED THAT AMONG THESE OBLIGATIONS IS ARTICLE I REQUIREMENT OF UNCONDITIONAL MFN TREATMENT OF ALL CONTRACTING PARTIES.

6. EC EXPRESSED CONCERN THAT THERE WOULD NOT BE "EQUAL PROTECTION" FOR CONCESSIONS AND OBLIGATIONS BECAUSE ARTICLE XXVIII IS "MORE RIGID" THAN ARTICLE XXIII. CHAIRMAN NOTED THAT UNDER BOTH ARTICLES THERE MUST BE AGREEMENT ON THE VALUE OF CONCESSIONS. HE ASKED IF EC WAS TRYING TO GET DIRECT ACCESS TO ARTICLE XXVIII TO DEAL WITH BREACHES OF AGREEMENT. CANADA SAID DIFFERENCE IN TWO ARTICLES IS THAT UNDER XXIII CP'S MUST AUTHORIZE LIMITED OFFICIAL USE

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RETALIATION, WHILE UNDER ARTICLE XXVIII A PARTY MAY TAKE ACTION UNILATERALLY. CANADA DECLARED ITSELF ABSOLUTELY OPPOSED TO "GIVING EC UNILATERAL ARTICLE XXVIII AUTHORITY". SECRETARIAT WAS ASKED TO PREPARE NOTE SUMMARIZING DISCUSSION OF THIS ISSUE TO HELP FOCUS FURTHER DEBATE.

7. CONCERTED DISCIPLINES: ONE EC EXAMPLE OF CONCERTED DISCIPLINES WAS CHEESE CONCESSION EC HAD GIVEN IN KENNEDY ROUND TO SWITZERLAND IN EXCHANGE FOR SWISS OBSERVANCE OF MINIMUM PRICE. CANADA DEFINED THIS AS EC "CONDITIONAL CONCESSION" TO SWITZERLAND, UNDER WHICH FAILURE TO MEET MINIMUM PRICE OBLIGATION "CARRIES ITS OWN RETALIATION". SWISS PRESUMABLY PAID EC FOR THIS CONCESSION, SAID CANADA, WITH CONCESSION IN SOME OTHER SECTOR. EC INSISTED THAT IN ITS VIEW SWITZERLAND TOO MADE CONCESSION AS PART OF THIS CONCERTED DISCIPLINE. EC ASKED WHETHER U.S. FELT BREACH OF AGREED PRICE IN CONCERTED DISCIPLINES WOULD BE DEALT WITH UNDER ARTICLE XXIII OR BY APPLICATION OF CVD'S. US REPLIED THAT U.S. WOULD COUNTERVAIL. U.S. THEN ASKED WHETHER CONCERTED DISCIPLINES COULD BE CONSISTENT WITH ARTICLE I PRINCIPLE OF UNCONDITIONAL MFN CONCESSIONS. SECRETARIAT REPLIED THAT ONCE CONCESSION IS IN A SCHEDULE, UNCONDITIONAL MFN TREATMENT MUST BE GIVEN; IF THE CONCESSION DEPENDS ON OBSERVANCE OF AN AGREED PRICE, HOWEVER, IT MUST BE SPECIFIED WHETHER NON-OBSERVANCE OF THIS PRICE WILL BE DEALT WITH UNDER ARTICLE XXIII OR UNDER ARTICLE VI. CHAIRMAN OPINED THAT CONCERTED DISCIPLINES ARE PERMISSIBLE UNDER ARTICLE I. CANADA ARGUED THAT EC'S DIFFERENTIAL SUBSIDIES (E.G. UNDER 1975 U.S. WAIVERS, WHICH EC HAS CITED AS TYPE OF "CONCERTED DISCIPLINE") DISCRIMINATE AGAINST CANADA AND ARE DUE TO CANADA'S LESSER BARGAINING LEVERAGE. AUSTRALIA ASKED WHETHER IT WOULD BE DISCRIMINATORY IN CASE OF US-EC CONCERTED DISCI-

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PLINES FOR AUSTRALIA AND NEW ZEALAND TO FIND THEMSELVES FORCED TO OBSERVE MINIMUM PRICE DISCIPLINES. EC NOTED THAT ARTICLE I OF GATT IMPLIES COUNTRIES MUST APPLY UNIFORM EXPORT TAXES, BUT NOT UNIFORM RESTITUTIONS. AUSTRALIA FINALLY DECLARED THAT IMPORTANT THING IS SIMPLY TO RECORD CONCESSIONS IN GATT SCHEDULES, PER EARLIER U.S. SUGGESTION.

8. CANADA NOTED THAT AS LONG AS DAIRY CONCESSIONS ARE IN GATT SCHEDULES, ONLY REMAINING CONCERN IS HOW TO GIVE "EQUIVALENT STRENGTH" TO OBLIGATIONS UNDER THE ARRANGEMENT, AND SUGGESTED THESE BE EXPLICITLY LINED TO ARTICLE XXIII. THEY REITERATED THAT CANADA OPPOSES UNILATERAL COMPENSATING WITHDRAWALS BY PARTY THAT THINKS IT HAS BEEN HURT BY AN ALLEGED BREACH OF OBLIGATIONS ON PART OF ANOTHER.

9. FINAL DISCUSSION OF THIS ISSUE CAME IN CONNECTION WITH DEBATE ON DURATION OF IDA AND POSSIBILITY OF A PARTICIPANT'S WITHDRAWAL FROM ALL OR PART OF ARRANGEMENT. CHAIRMAN DECLARED THAT SUCH WITHDRAWAL WOULD CONSTITUTE WITHDRAWAL OF OBLIGATIONS AND DAMAGE TO BALANCE, BUT ASKED ABOUT APPLICABILITY OF ARTICLE XXIII. IDA OBLIGATIONS, HE SAID, NOT ANNEXED TO GATT UNLESS GROUP SO SPECIFIES. US SUGGESTED WE SHOULD RULE OUT USE OF ARTICLE XXIII. THIS PROVOKED NEW DISCUSSION OF ISSUE, IN WHICH PARTICIPANTS THAT HAD EARLIER APPEARED TO FAVOR USE OF ARTICLE XXIII TO "PROTECT OBLIGATIONS" NOW EXPRESSED DOUBTS ABOUT PRACTICABILITY OF THIS COURSE. NEW ZEALAND DECLARED THAT OBLIGATIONS MUST HAVE "SUFFICIENT PROTECTION", BUT WAS UNCERTAIN HOW TO ACCOMPLISH THIS. U.S., JAPAN AND OTHERS SUGGESTED ARTICLE XXIII:1(B) AND (C) WOULD MAKE ARTICLE XXIII APPLICABLE UNLESS EXPLICITLY RULED OUT. EC DECLARED THAT IT DOES NOT ASK THAT ARTICLE XXVIII APPLY HERE, BUT DOES WANT OBLIGATIONS PROTECTED, AND WOULD SIMPLY CONDITION ALL ITS DAIRY CONCESSIONS ON

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CONTINUATION OF THE IDA.

10. EC ALSO ASKED DURING THIS DISCUSSION WHAT WOULD HAPPEN IF CONCERTED DISCIPLINE BETWEEN TWO PARTIES BROKE DOWN, INCREASING PRESSURE (TRADE DIVERSION) ON THIRD PARTY. EC ARGUED THAT THIRD PARTY SHOULD HAVE MEANS OF

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REDRESSING BALANCE. MOST DELEGATIONS SEEMED TO FIND THIS
IDEA DISTURBING. OUR PRESENT VIEW IS THAT EC WILL NOT
PRESS THIS POINT.

11. AUSTRALIAN MINIMUM PRICE PROPOSAL ON CHEESE: EC
SHARPLY QUESTIONED TECHNICAL SOUNDNESS OF PROPOSAL. NEW
ZEALAND ARGUED THAT PROPOSAL UNRELATED TO ANY REAL TRADE
PROBLEM. AUSTRALIA FELL BACK TO "SIMPLE PROPOSAL", WHICH
IN EFFECT SAYS "NO CHEESE SHALL BE SOLD FOR LESS THAN
(\$800) PER TON, AND LET THE MARKET SORT OUT PRICES OF
GOOD CHEESES". EC SAID MATTER NOT CRUCIAL. IT COULD GO
ALONG WITH AUSTRALIAN "SIMPLE PROPOSAL" IF OTHERS WANTED
BUT SUGGESTED IT WOULD BE BETTER SIMPLY TO INCLUDE PARA-
GRAPH IN CHEESE PROTOCOL PROVIDING FOR FURTHER NEGOTIATION
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OF SUCH AN ARRANGEMENT IF NECESSARY. AUSTRALIAN SIMPLE PROPOSAL PRESUMABLY WILL BE INCLUDED IN BRACKETS IN NEXT REVISION.

12. VARIABLE PARTICIPATION: EC, NEW ZEALAND AND CANADA ALL ARGUED THAT "MAJOR COUNTRIES", SPECIFICALLY INCLUDING US, MUST JOIN WHOLE AGREEMENT. EC AND CANADA SAID THAT IF U.S. (OR OTHER MAJOR COUNTRY) DOES NOT PARTICIPATE IN ALL OF AGREEMENT, THEY WILL NOT JOIN ANY OF IT. MOST DELEGATIONS AGREED, HOWEVER, THAT SOME PROVISION MIGHT BE MADE TO ALLOW SMALL COUNTRIES TO PARTICIPATE ONLY IN CERTAIN PARTS.

13. FOB/CIF: THERE WAS A LONG DEBATE ON THIS ISSUE. CANADA ARGUING THREAT IMPLIED BY US SALE OF NFDN TO MEXICO, SAID IT HAD TO BE ABLE TO PRICE FOB FROM ANY US PORT. OTHERS, INCLUDING EC, APPEARED TO FIND THIS QUESTIONABLE, BUT ALL AGREED NORDICS, AUSTRIA AND PERHAPS OTHERS WOULD NEED SOME SPECIAL PROVISIONS ON THIS POINT.

14. PRICE ADJUSTMENT: THIS ISSUE WAS SETTLED FOR MILK POWDER PROTOCOL. GROUP AGREED TO THIRD ALTERNATIVE (MTN/DP/W/27/REV. 4/CORR.1).

15. DISPUTE SETTLEMENT: NEW ZEALAND PROPOSED THAT PARAGRAPH V(F)(III) PROVIDING FOR INVOCATION OF NORMAL GATT PROCEDURES FOLLOWING DISCUSSION OF DISPUTES IN THE COUNCIL BE DELETED. THIS WOULD NOT PREVENT THE COUNCIL FROM CONSIDERING ANY MATTER RAISED BY A PARTICIPANT. US SECONDED NEW ZEALAND PROPOSAL POINTING OUT THAT THE RIGHT TO INVOKE GATT DISPUTE SETTLEMENT PROCEDURES SHOULD BE UNCONDITIONAL AND NOT DEPEND ON PRIOR INVOCATION OF THE COUNCIL PROCEDURES. US SUGGESTED THAT ARTICLE V(F) SHOULD THEREFORE BE DROPPED ALTOGETHER. NEW ZEALAND LIMITED OFFICIAL USE

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SUPPORTED THIS PROPOSAL BUT THE CHAIR POINTED OUT THAT THIS WOULD LEAVE THE IDA WITHOUT BUILT IN SANCTIONS.

16. FOOD AID: THE EC PROPOSED THAT THERE BE A COMMITMENT IN PRINCIPLE IN THE IDA PROVIDING FOR FOOD AID WITH DAIRY PRODUCTS TO LDC'S. SEVERAL DELEGATIONS (INCLUDING US) FOUND EC SUGGESTION INTERESTING BUT ASKED FOR PRECISE PROPOSAL IN WRITING. IN THIS CONTEXT US REITERATED A PROPOSAL MADE EARLIER THAT A COUNTRY ASKING FOR A DEROGATION FROM MINIMUM PRICE IN ORDER TO SELL NFDN AS FEED SHOULD FIRST BE REQUIRED TO DEMONSTRATE THAT THE PRODUCTS IN QUESTION CANNOT BE USED AS FOOD AID. CANADA, AUSTRALIA AND NEW ZEALAND HAD RESERVATIONS ON THIS PROPOSAL.

17. PERIOD OF VALIDITY: THE CHAIR ENVISAGED THAT THE NEW MINIMUM PRICES EXPECTED TO BE AGREED UPON IN THE FIRST DAYS OF JULY WOULD COME INTO FORCE ON JANUARY 1, 1979. THIS, HOWEVER, PRESUPPOSES THAT THE AGREEMENT COULD BE IN FORCE AT THAT DATE - AN UNLIKELY EVENTUALITY. THE QUESTION OF THE COMING INTO FORCE WAS THEREFORE LEFT OPEN. THE PERIOD OF VALIDITY OF THE AGREEMENT WAS ALSO DISCUSSED AND THERE SEEMED TO BE A GENERAL INCLINATION TO LEAVE IT OPEN-ENDED, I.E. WITHOUT TERMINAL DATE.

18. AT THE END OF THE MEETING THE QUESTION OF THE RELATIONSHIP BETWEEN THE ARRANGEMENT AND ITS ANNEXES AND THE RELATION BETWEEN THE ARRANGEMENT AND THE GATT WERE ANEW DISCUSSED. THE CHAIR EXPRESSED THE OPINION THAT THE WITHDRAWAL OF A TARIFF OR NTM CONCESSION EMBODIED IN A GATT SCHEDULE WOULD NOT AFFECT THE VALIDITY OF IDA. CONVERSELY, WITHDRAWAL FROM IDA OR TERMINATION OF IDA WOULD NOT AFFECT THE CONCESSIONS IN THE GATT SCHEDULES. GATT ARTICLE XXIII WOULD NOT NECESSARILY APPLY TO THE IDA. THE WORD "AGREEMENT" IN ARTICLE XXIII(1) OF GATT APPLIES TO THE GATT AS SUCH AND NOT TO AN AGREEMENT SUCH AS THE LIMITED OFFICIAL USE

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IDA. US SUGGESTED THAT THIS VIEW SHOULD BE MADE EXPLICIT IN THE TEXT OF THE IDA. IT SHOULD BE STATED THAT NEITHER

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ARTICLE XXIII NOR ARTICLE XXVIII WILL APPLY TO THE IDA
OBLIGATIONS IN CONTRADISTINCTION TO THE GATT SCHEDULE CON-
CESSIONS.

19. DRAFTED BY PATTERSON AND KOENIG. MCDONALD

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